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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 558

MAGNOLIA PETROLEUM COMPANY, THE OHIO OIL COMPANY, THE SUPERIOR OIL COMPANY AND WESLEY WEST, *Petitioners*

v.

FEDERAL POWER COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, by their respective attorneys, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit dismissing, for lack of jurisdiction, petitioners' respective petitions for review of Federal Power Commission Order No. 174-A.

The cases of these several petitioners involve identical and closely related questions which merit review by this Court. This single petition is presented pursuant to Rule 23(5) of the Rules of this Court.

OPINION AND ORDER BELOW

The opinion and dissenting opinion of the court of appeals (R. 485, 503; App. A, 1, 16)[1] are reported at 236 F. 2d 785 and 793. Order No. 174-A of the Federal Power Commission and the dissenting views of Commissioner Digby (R. 112-116; App. A, 79-96) are published at 19 F.R. 5081.

JURISDICTION

The judgments of the court of appeals (R. 545, 595, 682, 771; App. A, 51-52) were entered on June 30, 1956. Petitions for rehearing were denied on August 21, 1956 (R. 574, 605, 688, 778; App. A, 53-54). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an order issued by the Federal Power Commission, without notice or hearing, purporting to promulgate regulations applicable to an identifiable class of persons, is reviewable under Section 19(b) of the Natural Gas Act or Section 10 of the Administrative Procedure Act in proceedings instituted in a court of appeals by persons belonging to the class, who allege that the order applies to them, that it exceeds the statutory authority of the Commission and its

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[1] Throughout this petition the citation "R" will refer to the Transcript of Record certified by the clerk of the court of appeals. "App." citations refer to Appendix A or Appendix B, which, because the materials are voluminous, have been printed separately, as permitted by Rule 23 (1)(i). Appendix A comprises the materials required by Rule 23(1)(i) to be appended to the petition for certiorari. Appendix B contains additional pertinent portions of the record which, as filed in this Court, is partly printed and partly typewritten.

powers of regulation, that it unlawfully interferes with and disrupts their businesses, and that it is of a substantive character and has an immediate impact upon them and their businesses.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act of June 21, 1938, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, are printed in Appendix A, presented herewith, at pages 131-140.

STATEMENT

This is a proceeding in which petitioners seek judicial review of Order No. 174-A of the Federal Power Commission (19 F.R. 5081; 18 CFR, Parts 154 and 157; R. 112-116; App. A, 79-96). That order was issued by the Commission on August 6, 1954, without notice or hearing, and took effect immediately (R. 114; App. A, 89). It superseded Order No. 174 issued on July 16, 1954, also without notice or hearing, which likewise went into effect immediately (19 F.R. 4534; R. 87-111; App. A, 59-78). Both orders were purportedly based on the decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672.[2] They were made applicable to a class of persons called "independent producers", who, for the first time, were subjected by such orders to the Commission's jurisdiction. Order No. 174-A, the one under attack, defined, delimited and fixed the rights and duties of independent pro-

[2] The question presented in the *Phillips* case was a narrow one, being limited to whether, under Section 5 of the Natural Gas Act, 15 U.S.C. 717d (App. A, 134), the Federal Power Commission could regulate the sales price of gas sold by Phillips at the tailgates of its gasoline plants. See 347 U.S. at 674-675.

ducers under contracts entered into before the *Phillips* decision, as well as their rights under contracts subsequently entered into.

As to existing contracts the order *inter alia* (a) rolled back all contract prices to the level of those in effect on June 7, 1954 (Sec. 154.94; R. 112-113; App. A, 81-83); (b) fixed future rates at the June 7, 1954, prices (Sec. 154.94(c); R. 112; App. A, 82); (c) determined that all subsequent periodic price increases provided for in contracts were subject to the Commission's suspension powers under Section 4(e) of the Act (Sec. 154.94(d); R. 112; App. A, 82); (d) required all oral contracts to be reduced to writing (Sec. 154.95; R. 113; App. A, 83); (e) commanded the filing, as rate schedules, of every written contract under which gas deliveries were being made on June 7, 1954 (Sec. 154.92(a); R. 112; App. A, 80-81); (f) directed the continuance of deliveries until certificates of public convenience and necessity were applied for and acted upon by the Commission (Sec. 157.23(a); R. 113; App. A, 85); (g) commanded the filing of such applications within some 60 days (*Ibid.*); and (h) prohibited the abandonment of any sale being made on June 7, 1954, without prior approval of the Commission (Sec. 157.28; R. 114; App. A, 89).

As to new contracts, the order *inter alia* (a) required such contracts to be filed as rate schedules (Sec. 154.92(b); R. 112; App. A, 81); (b) determined that all subsequent increases provided for in such contracts were subject to the Commission's suspension powers under Section 4(e) (Sec. 154.94(b) and (d); R. 112; App. A, 82); (c) required the filing of applications for certificates of public convenience and necessity before commencing deliveries (Sec. 157.23(b); R. 113;

App. A, 85-86); and (d) prohibited the abandonment of such deliveries without Commission approval (Sec. 157.28; R. 114; App. A, 89).

Petitioners are engaged in the business of producing and gathering natural gas. As an incident of this business, they sell under many different contracts portions of their production to natural gas companies who transport and resell the gas in interstate commerce, but petitioners do not own or operate interstate transportation lines or facilities. (R. 378-386; 388; 396-397; 408-409; 430-432; App. B, 143-149; 151; 162-163; 172-173; 190-191). The impact of the order upon petitioners, and their business and operations, was immediate and profound.

Being convinced that the order commanded, inhibited and prohibited action not commanded, inhibited or prohibited by the Natural Gas Act, and knowing that violation of the order might subject petitioners to heavy criminal penalties, even though they violated no provision of the Natural Gas Act, petitioners timely filed with the Federal Power Commission their respective applications for a rehearing with respect to Order No. 174-A (R. 375-395, 396-406, 407-429, 430-439; App. B, 141, 162, 172, 190), this being the procedure prescribed for asserting the existence of error in decisions or orders of the Commission.[3] On September 8, 1954, the Commission ordered oral argument on these applications for rehearing, along with those filed by numerous other producers (19 F.R. 5952; R. 117-122; App. A, 97-99). This order also denied

[3] Section 19(a) of the Natural Gas Act, 15 U.S.C. 717r (App. A, 138); Federal Power Commission, Rules of Practice and Procedure, Section 1.34 (App. B, 198).

all requests for a stay of Order No. 174-A. Following oral argument, the Commission, on September 24, 1954, modified Order No. 174-A so as to make one minor clarification and to postpone the filing date prescribed therein from October 1, 1954, to December 1, 1954 (19 F.R. 6301; R. 370-372; App. A, 100-101).

In November 1954, the Commission having allowed more than thirty days to elapse without acting on their applications for rehearing, petitioners treated such applications as having been denied[4] and instituted the present proceedings under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), (App. A, 138-139), by separately filing with the court of appeals for the Fifth Circuit their petitions for review of Order No. 174-A (R. 1, 576, 607, 690; App. B, 199, 214, 224, 235). Petitioners Magnolia Petroleum Company, The Superior Oil Company and Wesley West also invoked the provisions of Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009. In connection with the filing of their petitions, petitioners Magnolia Petroleum Company and The Ohio Oil Company obtained from the court of appeals orders staying Order No. 174-A pending final hearing of their petitions for review (R. 77, 594, App. A, 128, 129). Thereafter, on December 17, 1954, the Federal Power Commission issued its Order No. 174-B, revising in certain respects the procedure prescribed in Order No. 174-A (19 F.R. 8807; R. 447-479; App. A, 102-127). In Order No.

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[4] Both Section 19(a) of the Natural Gas Act, 15 U.S.C. 717r(a) (App. A, 138), and Section 1.34(c) of the Commission's rules of Practice and Procedure (App. B, 198) provide:

> Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application shall be deemed to have been denied.

174-B, the Commission formally denied all applications for rehearing of Order No. 174-A, including those filed by petitioners.

In their petitions for review filed with the court of appeals, and in their applications for rehearing filed with the Commission, petitioners challenged the validity of Order No. 174-A on numerous grounds, many of which had been brought to the attention of the Commission by Commissioner Digby in his forceful dissent to the order (R. 115-116; App. A, 91-96). The grounds urged by petitioners are ably presented and discussed by Circuit Judge Brown in his dissenting opinion (R. 503-544; App. A, 16-50) and footnoted in the majority opinion of the court of appeals (R. 494-495; App. A, 8-9).

The four proceedings instituted by these petitioners were heard and considered by the court of appeals on a single record (R. 86-87; App. A, 130). On June 30, 1956, the court, in a two-to-one decision, dismissed each of the petitions for review filed by these petitioners (R. 485, 545, 595, 682, 771; App. A, 1, 51, 52). Despite its careful analysis of the serious, substantive contentions urged by petitioners as to the invalidity of the order (R. 494-495; App. A, 8-9), the majority opinion of the court of appeals is rested on the sole ground that Order No. 174-A is not a reviewable "order" within the purview of Section 19(b) of the Natural Gas Act, because it was not an order entered upon hearing and findings after completion of the administrative process but, on the contrary, was no more than a promulgation of regulations of general applicability, not self-executory and not commanding these petitioners to do or to refrain from doing anything (R. 485, 496-498; App. A, 1, 10-12). The majority

opinion disregarded the other procedural and substantive issues raised by petitioners. In an able and articulate dissenting opinion, Circuit Judge Brown strongly disagreed and pointed out the many errors in the majority opinion which pinpoint the need for review on writ of certiorari (R. 503-544; App. A, 16-50).

On August 21, 1956, petitions for rehearing filed by each of these petitioners were denied by the court of appeals (R. 574, 605, 688, 778; App. A, 53-54). By orders issued the same date, the certification of the opinion and judgments of the court of appeals was stayed until final disposition of the matter by this Court, conditioned upon proof of timely application for review by this Court on writ of certiorari (R. 575, 606, 689, 779; App. A, 55-58).

REASONS FOR GRANTING THE WRIT

I.

Order No. 174-A Is a Reviewable Order

The majority of the court of appeals made no attempt to determine the validity or invalidity of Order No. 174-A. It held instead that the order is not a reviewable "order", on the sole ground that it is not a definitive order dealing with the merits of a proceeding before the Commission and resulting from a hearing and findings of facts (R. 496-497; App. A, 10-11).[5] The majority concluded that, on the contrary,

[5] The court of appeals did not pass upon the first two of the three contentions advanced by counsel for the Commission, namely, that petitioners (1) have not exhausted their administrative remedies and (2) are not "aggrieved" by the order (see R. 496; App. A, 10). Consequently, those issues are not present in this request for supervisory action by this Court, and the Commission's con-

the order constituted merely "regulations of general applicability", that it "does not change petitioners' existing or future status", that it "is not self-executory and it does not command these petitioners to do or refrain from doing anything" (R. 497-498; App. A, 11).

We shall show in Point II, *infra.*, pp. 16-21, that Order No. 174-A is in fact a definitive order which directly and immediately affects the substantive rights of these petitioners. At the outset, however, it is to be noted, with emphasis, that the conclusion of the majority of the court of appeals as to the nonreviewability of Order No. 174-A is directly in conflict with three recent and unequivocal pronouncements by this Court: *Columbia Broadcasting System* v. *United States,* 316 U.S. 407; *Frozen Food Exp.* v. *United States,* 351 U.S. 40; and *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192.

In *Columbia Broadcasting System* v. *United States,* this Court held reviewable the Federal Communications Commission's chain broadcasting regulations which provided for the refusal of licenses to broadcasting stations having certain types of exclusive-service contracts with a network organization. In *United States* v. *Storer Broadcasting Co.,* jurisdiction was upheld for the judicial review of an order amending the general Rules of the Commission so as to restrict the number of broadcasting stations in which a licensee may have a direct or indirect interest. *Frozen Food Exp.* v. *United States,* held that judicial review should

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tentions as to prematurity and lack of aggrievement, if renewed by the Commission in opposition to this petition, would not be relevant. The basic question here presented is the reviewability of Order No. 174-A.

have been exercised to test an order of the Interstate Commerce Commission declaring certain specified commodities not to be "agricultural commodities" within the meaning of the statutory provision exempting carriers of such commodities from certificate requirements.

In each of these three recent cases, the administrative order under attack was one of general application, not directed to any individual party. In each instance, the statutory authorization for judicial review applied only to "final orders" or "final agency action" (see 5 U.S.C. 1009 and 1034; 47 U.S.C. 402(a)). In each case, there was no conventional administrative proceeding, with a hearing, evidence and findings of facts.[6] Each of the respective parties seeking judicial review did so as a member of the particular industry, or of a segment thereof, whose activities or business relations were affected by the general agency order.[7]

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[6] In the *Columbia Broadcasting* case the regulations were issued following an investigation by a committee of the Commission in which, at the request of the committee, Columbia and other networks intervened and presented briefs and oral arguments. 316 U.S. at 409. In the *Storer Broadcasting* case the only prior action consisted of the Commission's issuance of a notice of rulemaking which, under the Administrative Procedure Act (5 U.S.C. 1003(b)), permitted "interested" parties to file statements or briefs. Storer and other broadcasters filed their objections in this manner, but the Commission thereafter issued its order adopting the proposed regulations without significant change. 351 U.S. at 193-194. In the *Frozen Food* case, the Commission instituted an investigation on its own motion and a public hearing was held by an examiner, where various public agencies, shippers and carriers appeared, following which the Commission issued its report and order. 351 U.S. at 41-42.

[7] In the *Frozen Food* case, Frozen Food Express was not even a party to the administrative investigation. See 351 U.S. at 42.

Notwithstanding the general character of each of the orders challenged in the *Columbia Broadcasting, Storer Broadcasting* and *Frozen Food* cases, this Court held, in each instance, that the order in question was subject to judicial review without further proceedings. In so holding, this Court emphasized the "immediate and practical impact" of the orders on those coming within the terms thereof (351 U.S. at 44), because the orders operated to "presently determine rights" (316 U.S. at 421) and "to control the business affairs" and contractual relations of the members of the affected industry (351 U.S. at 199; 316 U.S. at 422). Such orders, it was held, constitute "final agency action" within the meaning of the statutory authorization for judicial review. See 351 U.S. at 198. See also *Amshoff* v. *United States*, 228 F. 2d 261, 265 (C.A. 7, 1955), cert. den. 351 U.S. 939.

It was also found in the three cases mentioned that the petitioning network, broadcasting and trucking companies had present standing to seek judicial review. As persons whose contractual rights were immediately affected by the provisions of the orders, and who might, upon failure to comply with the orders, be subjected to economic injury or criminal penalties (see 316 U.S. at 417; 351 U.S. at 44; 351 U.S. at 198), the companies were "parties aggrieved" by the orders. 351 U.S. at 198. The fact that the orders were not specifically directed to the companies seeking review was held to be immaterial. As was said in the *Columbia Broadcasting* case (316 U.S. at 422):

> Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penal-

> ties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked.

There is no material difference between the situation involved in the present case and those before this Court in the *Columbia Broadcasting*, *Storer* and *Frozen Food* cases. Here, as in those cases, an administrative agency has undertaken to interpret—erroneously, we believe—its basic statute and has promulgated that interpretation in the form of a general order applicable to *all* independent producers of natural gas, a class to which these petitioners belong. The order *inter alia* presently commands petitioners to file rate schedules (freezing those rates as of June 7, 1954), to apply for certificates of public convenience and necessity, and to continue sales until Commission approval for abandonment is obtained. See pp. 4-5, *supra*. It thus has an "immediate impact" on petitioners' contractual relationships and the conduct of their business affairs.[8] Moreover, a violation of the order will subject petitioners to heavy criminal penalties under Section 21(b) of the Natural Gas Act (15 U.S.C. 717t(b); App. A, 140), the consequences of which "are not conjectural." See 351 U.S. at 44. These petitioners occupy the same

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[8] As noted by the dissenting judge (R. 527-528; App. A, 35-36) and as alleged by petitioners (see R. 11-12; App. B, 207), the interstate pipeline companies refused to make payments or honor the terms of their contracts unless these petitioners immediately complied with Order No. 174-A.

position as that held by the network, broadcasting and trucking companies concerned in the three cases discussed. Petitioners, like those companies, are entitled to the judicial review here sought.

The court of appeals, in its majority opinion, makes no mention whatever of the *Storer Broadcasting* and *Frozen Food* cases, notwithstanding the able discussion of those cases in the dissenting opinion of Circuit Judge Brown (R. 508-514; App. A, 19-24). The majority opinion does, however, devote some three pages to an effort to distinguish the *Columbia Broadcasting* case, on the ground that the review there sought was in an equity proceeding brought in a district court under Sec. 402(a) of the Federal Communications Act, rather than by an appeal to the court of appeals under Sec. 402(b) (R. 498-501; App. A, 12-14). This attempted distinction is without basis and reveals a complete misconception of the interrelation of the two methods of review provided by the Communications Act. As this Court has been careful to point out, there is no difference between the types of review available under Sec. 402(a) and Sec. 402(b), the "two roads to judicial review" being merely "the product of Congressional solicitude for the convenience of litigants." *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U.S. 4, 15-16. This is also clear from the *Storer Broadcasting* case, where the review was under Sec. 402(b) and not Sec. 402(a), as was pointed out by Circuit Judge Brown in his footnote 6 (R. 513; App. A, 23). The view of the majority cannot be correct, since, if the judgments below are allowed to stand, Order No. 174-A will never be subject to judicial review. See *Federal Power Commission* v. *Union Producing Company,* 97 U.S. App. D.C. 223, 230 F. 2d 36 (C.A.D.C. 1956), cert. den. 351 U.S. 927; and see

dissent of Circuit Judge Brown, footnote 1 (R. 508-509; App. A, 19).

The majority of the court of appeals relies chiefly on *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, to conclude that Order No. 174-A is not a reviewable "order" because it is not an order "dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." (R. 496-498; App. A, 10-12). The *Metropolitan Edison* case applies to circumstances wholly distinguishable from the present situation, because there the petition filed with the court of appeals merely sought a rule to show cause why the Commission should not be restrained from proceeding with an inquiry involving the petitioner pending disposition of a petition for rehearing. See 304 U.S. at 379. As this Court appropriately noted, "There was no order of the Commission before the Circuit Court of Appeals for review" and "no application for such a review had been made." 304 U.S. at 381. Moreover, a factual record and findings are not prerequisites to review of an administrative order where the questions presented are legal in character. See *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327, 330-331; *Atlantic Seaboard Corp.* v. *Federal Power Com'n*, 201 F. 2d 568, 572-573 (C.A. 4, 1953); *American Broadcasting Co.* v. *Federal Communications Com'n*, 89 U.S. App. D.C. 298, 306-307; 191 F. 2d 492, 501-502 (C.A.D.C., 1951). In any event, as was forcefully stated by the dissenting judge (R. 514, fn. 6; App. A, 24), the absence of a hearing, evidence and findings, which is the very basis of the attack, cannot, by a bootstrap-lifting process, be turned into a deficiency

making an order nonreviewable. It is also immaterial that the question might be raised in subsequent proceedings brought to enforce the order. *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 132; *Varney* v. *Warehime,* 147 F. 2d 238, 243 (C.A. 6, 1945), cert. den. 325 U.S. 882. See also *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 423. As was there said (316 U.S. at 425):

> The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

The circumstances of the present case meet all of the tests of reviewability prescribed by this Court in the *Columbia Broadcasting, Storer Broadcasting* and *Frozen Food* cases. The decision of the court of appeals is totally in conflict with those authoritative rulings by this Court.

II.

Order No. 174-A Constitutes a Definitive and Illegal Invasion of Petitioners' Substantive Rights

As has been stated, *supra,* p. 8, the validity or invalidity of Order No. 174-A was not determined by the court of appeals but the petitions of these petitioners were dismissed for lack of jurisdiction on the ground that the order is not a definitive order. As is clearly shown by Circuit Judge Brown in his dissenting opinion (R. 514-536; App. A, 24-43), such order was definitive in character, affected the substantive rights of these petitioners, was self-executing and had

an immediate impact upon these petitioners. The dissenting judge, after discussing and emphasizing the substantive character and specific impact of the order, concludes as follows (R. 536; App. A, 43):

> These and many other specific impacts result from the Order, but those discussed sufficiently illustrate the practical consequences and the ripeness now for judicial review. Serious questions of law call for an immediate determination by constitutional courts. Neither orderly administration nor due regard to the separation of executive and judicial functions compels or suggests that review should be postponed.

The definitive character of Order No. 174-A is clearly demonstrated by the language employed in the order. Of particular significance is its mandatory and imperative terminology. The word "shall" is repeated throughout the order. For example (R. 112-114; App. A, 79-89): "Every independent producer . . . *shall* . . . file with the Commission rate schedules . . ." (Sec. 154.92(a)). "No change *shall* be made in any rate." (Sec. 154.94(a)). "Every change in a rate schedule . . . *shall* be filed with the Commission." (Sec. 154.94(b)). "The operation of any provision of the rate schedule providing for future or periodic changes in the rate . . . *shall* constitute a change in rate schedule." (Sec. 154.94(c)). "With each change in rate schedule there *shall* be submitted reasons." (Sec. 154.94(e)). "If any rate schedule . . . is not in writing, its terms *shall* be reduced to writing." (Sec. 154.95). "Every independent producer . . . *shall* . . . file with the Commission an application . . ." [for a certificate, and pending] "action by the Commission on an application hereunder, the service for which authorization is sought *shall* be continued." (Sec. 157.23(a)). "No

independent producer of natural gas *shall* . . . engage in any new service . . . without approval of the Commission, evidenced by a certificate of public convenience and necessity . . ." (Sec. 157.23(b)). "No independent producer . . . *shall* abandon any sale . . . without the express permission and approval of the Commission . . ." (Sec. 157.28).

It is thus seen that the majority opinion of the court of appeals is totally in error in its conclusion that Order No. 174-A "does not change the petitioners' existing or future status" and "does not command these petitioners to do or refrain from doing anything." (R. 497-498; App. A, 11). Precisely the opposite is true. The order is a definitive command to all independent producers, including these petitioners, to perform certain acts, as is forcefully demonstrated in the dissent of Judge Brown (R. 514-536; App. A, 24-43).

It is also clear that the requirements of Order No. 174-A constituted a direct and unlawful invasion of petitioners' substantive rights under the Constitution and under the Natural Gas Act. For example, Sec. 154.94, as promulgated in the order, would retroactively freeze the rates which petitioner may charge for gas at those prevailing on June 7, 1954, although petitioners may and do have previously executed sales contracts providing for periodic price increases subsequent to that date. This is in contravention of Section 5(a) of the Natural Gas Act (15 U.S.C. 717d(a), App. A, 134), which merely authorizes the Commission to determine rates "to be *thereafter* observed and in force." *Federal Power Commission* v. *Hope Gas Co.*, 320 U.S. 591, 618. See also *Montana-Dakota Co.* v. *Public Serv. Co.*, 341 U.S. 246, 251.

Section 154.94 also provides that such periodic price increases shall constitute new rates for which new rate schedules must be filed under Section 4(c) of the Act (15 U.S.C. 717c; App. A, 132) which, when filed, would be subject, under Section 4(e) of the Act (App. A, 133-134), to the Commission's power to suspend the effective date of the increase for a period of five months and thereafter to require the furnishing of a bond pending a determination by the Commission of the lawfulness of the higher rate. In this respect, the order would directly affect petitioners' contractual rights. The provisions for periodic price increases are a part of the producers' original sales contracts and the Commission has no power, under Sec. 4 of the Act, to disregard rate provisions embodied in a basic contract. This is made clear by the recent decision of this Court in *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332. See also *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348. As was specifically noted in the *Mobile* case (350 U.S. at 338-339):

> In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. * * * Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.

Under the Act, if the Commission believes that a rate under a contract is too high, it may proceed to reduce the rate, after notice and hearing, under Section 5. But it cannot nullify the provisions of the contract, without notice or hearing, as it attempted to do in Order No. 174-A, by the device of defining increases under the contract as changes in rates and thus requiring the filing of new rate schedules, the operation of which it would subject to its suspension powers. It is Order No. 174-A which defines an increase under a contract as a change in the rates, and not the Natural Gas Act, and in the absence of such order these petitioners would have been entitled to collect all periodic increases under their contracts until such time as the Commission might find, in a Section 5 proceeding, that the rates were too high.

The order also violates petitioners' rights under Section 7 of the Natural Gas Act (15 U.S.C. 717f; App. A, 134-138) in that it commands petitioners to apply for certificates of public convenience and necessity (Sec. 157.23), commands independent producers to continue sales and deliveries being made on June 7, 1954, and prohibits the abandonment thereof except with Commission approval (Sec. 157.28), although a producer may prefer to withdraw from the business. Section 7 of the Act contains no such mandatory provisions. Section 7(c) of the Act merely provides that sales covered by the Act may not be commenced or continued unless a certificate has first been obtained. In other words, under the Act, the acquisition of a certificate or the continuance of previously made sales is entirely optional. In like manner, Section 7(b) of the Act, which relates to abandonment, applies only to facilities subject to the jurisdiction of the Commis-

sion and the service rendered by such facilities. All of the facilities operated by petitioners are production and gathering facilities, which are not subject to the jurisdiction of the Commission, being specifically exempted by Section 1(b) of the Act (15 U.S.C. 717(b), App. A, 131).[9] *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508.

Another respect in which Order No. 174-A encroaches upon petitioners' contractual rights, in violation of the statute, is found in the provision requiring that all rate schedules not in writing shall be reduced to writing (Sec. 154.95). This would deprive petitioners of the right to sell their gas on a day to day basis, if they should so desire, under oral contracts or under *ex parte* tariff schedules. There is nothing in the Natural Gas Act which prohibits the sale of gas under oral agreements or *ex parte* tariff schedules. Only the order would forbid such arrangements.

It is thus clear that Order No. 174-A is an attempt by the Federal Power Commission to extend its powers and jurisdiction far beyond those vested in the Commission by the Natural Gas Act. In commanding these petitioners to do and not to do things not required or prohibited by the Act, the order constitutes a direct invasion of petitioners' substantive rights. This ines-

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[9] This exemption was not affected by the *Phillips* decision. As has been shown *supra*, fn. 2, p. 3, the question there was a narrow one, being limited to jurisdiction over "*rates* charged" by a producer and gatherer in an interstate sale for resale. 347 U.S. at 674. There is nothing in the *Phillips* case which holds that other provisions of the Natural Gas Act, such as those of Section 7 relating to certificates of public convenience and necessity and to the abandonment of facilities or service, can be considered applicable to producers and gatherers without transgressing the exemption provision of Section 1(b).

capable fact is emphasized in the impressive dissenting opinion of Judge Brown (R. 514-536; App. A, 24-43).

It may also be mentioned that Order No. 174-A infringes upon rights and powers reserved to the States under the Constitution and by the Natural Gas Act. The command to continue selling the volumes of gas being sold on June 7, 1954, and to abandon such sales only with Commission approval (Sec. 157.28), is in effect a command to continue production at the levels prevailing on June 7, 1954. But the production of natural gas and the rate of such production are matters under the exclusive control of the States and their conservation agencies. *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, 690. See also *Federal Power Commission* v. *Hope Gas Co.,* 320 U.S. 591, 612; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498, 508.

The foregoing summary of the manner in which Order No. 174-A exceeds the statutory authority of the Commission and directly invades the substantive rights of these petitioners takes on particular significance when it is remembered that the court of appeals dismissed the several petitions for review for want of jurisdiction. In each of the petitions for review the relevant facts as to the nature of the order and its infringement upon petitioners' rights were fully alleged (R. 1-15, 576-592, 607-619, 690-706; App. A, 199-210; 214-223, 224-234, 235-245). These allegations must be accepted as true in determining the jurisdiction of the court. *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 414; *American Sumatra T. Corp.* v. *Securities and Exch. Com'n,* 68 App. D.C. 77, 80; 93 F. 2d 236, 239 (C.A.D.C., 1937); *Philadelphia Co.* v. *Securities & Exchange Commission,* 82 U.S. App.

D.C. 335, 336; 164 F. 2d 889, 890 (C.A.D.C., 1947), cert. den. 333 U.S. 828. Indeed, they were not controverted. They are, in themselves, sufficient to require the court of appeals to exercise its powers of judicial review. As was concluded in the *Frozen Food* case, "the issues raised in the complaint are justiciable" and the court "should adjudicate the merits." 351 U.S. at 45. See also *Columbia Broadcasting System* v. *United States,* 316 U.S. at 423; *United States* v. *Storer Broadcasting Co.,* 351 U.S. at 196-198.

CONCLUSION

The Federal Power Commission has issued an order which directly aggrieves these petitioners and adversely affects their substantive rights. The refusal of the court of appeals to review that order is an error which this Court should correct. In any event, the decision of the court of appeals is so openly in conflict with the recent decisions of this Court in the *Columbia Broadcasting, Storer Broadcasting* and *Frozen Food* cases that this Court may well see fit to grant the certiorari here sought and reverse the decision below in a single order, with instructions to determine the validity *vel non* of the order.

For all the reasons hereinabove given, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 558

MAGNOLIA PETROLEUM COMPANY, THE OHIO OIL COMPANY, THE SUPERIOR OIL COMPANY AND WESLEY WEST, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

Order No. 174–A of the Federal Power Commission (Pet. App. 79–96) is reported at 19 Fed Reg. 5081. The opinion of the Court of Appeals (Pet. App. 1–50) is reported at 236 F. 2d 785.

JURISDICTION

The judgments of the Court of Appeals were entered on June 30, 1956 (Pet. App. 51–52). Petitions for rehearing, timely filed, were denied on August 21, 1956 (Pet. App. 246–250, 253–256, 260–267, 53–54). The petition for a writ of certiorari

was filed on November 8, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTION PRESENTED

Whether a Court of Appeals has jurisdiction, under Section 19 (b) of the Natural Gas Act, to review a general order of the Federal Power Commission providing a simplified procedure whereby those independent producers subject to regulation under the Act by virtue of this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, may come into compliance with the Act.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the Natural Gas Act and the Federal Power Commission Regulations are set forth in the Appendix to the petition at pages 131–140, 59–127.

STATEMENT

By petitions filed in the United States Court of Appeals for the Fifth Circuit, petitioners, independent producers of natural gas, sought review of an order of the Federal Power Commission (Order No. 174–A) establishing a procdure for effectuating this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672. The Court of Appeals dismissed the petitions, holding that the Commission order was not reviewable under Section 19 (b) of the Natural Gas Act. The relevant facts may be summarized as follows:

On June 7, 1954, this Court held in the *Phillips* case that independent producers of natural gas were subject to regulation under the Natural Gas Act to the extent that they engaged in "wholesales of natural gas in interstate commerce" (347 U. S. at 682). Prior to that time, the Federal Power Commission had directed its regulation under the Act to companies engaged primarily in interstate pipeline operations, and activities incident thereto; the rules and orders issued by the Commission had been mainly designed to implement regulation of such interstate pipeline companies (F. P. C. Order No. 144, 13 F. R. 6371). However, these rules and orders were directed to "natural-gas companies," and so in terms included the independent producers which were held by the *Phillips* decision to be "natural-gas companies." Not wishing to subject these independent producers to the more onerous requirements of the rules and regulations applicable to pipeline companies, the Commission issued, on July 16, 1954, its Order No. 174 (19 F. R. 4534) providing "reasonably simple rules and regulations" to be applicable to those "independent producers" (as there defined) which are "natural-gas companies" within the meaning of Section 2 (6) of the Natural Gas Act as construed by this Court in *Phillips*. On August 6, 1954, the Commission issued its Order No. 174–A, which superseded Order No. 174 but made no substantial change in the provisions here involved (19 F. R. 5081).[1]

[1] The orders were issued without notice or hearing because the Commission found, in accordance with Section 4 (a) of the

Order No. 174–A adopted substantially the language of the *Phillips* decision in defining the class of independent producers of natural gas subject to the Act as including those natural gas companies "engaged in the production or gathering of natural gas and who transport[s] natural gas in interstate commerce or sell[s] natural gas in interstate commerce for resale * * *" (347 U. S. at 683, 684; Pet. App. 80). The order did not purport to determine which of the over 4,000 independent producers were subject to regulation under the Act but left such determinations, which frequently involve complex factual questions, to individual hearings.[2] The order required producers subject to the

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Administrative Procedure Act, 5 U. S. C. 1003 (a), that "good cause exists for making the rules and regulations herein adopted effective on less than thirty days' notice" in order to minimize the uncertainty and confusion which would result from delay in carrying out this Court's mandate in the *Phillips* proceeding (Pet. App. 60).

[2] In issuing Order No. 174, the Commission had stated (Pet. App. 60–61):

> Although the decision of the Supreme Court is, of itself, notice to all "independent producers," as hereinafter defined, of their responsibilities and duties under the Natural Gas Act, the Commission recognizes that there may be areas of uncertainty and there may be a few situations where independent producers have, in good faith, endeavored to invoke a price increase provided in a sales contract executed prior to June 7, 1954, or in good faith taken other steps since said date without Commission approval which require the same.
>
> Of course, any action which requires Commission approval under the law is not effective without it. The Commission will do all it can to assist in adjusting any such matters, without unnecessary punitive action, to the end that all independent producers will receive like treatment as of June 7, 1954, henceforth.

Act to file with the Commission, by October 1, 1954, schedules for existing rates in effect on June 7, 1954, the date of the *Phillips* decision, and applications for certificates of convenience and necessity for existing service (Pet. App. 80). When a large number of natural gas producers, including petitioners, filed motions for rehearing and a stay of Order No. 174–A, the Commission denied all the requests for stays but called for briefs and suggestions as to revision of the order and granted oral argument on the motions (Pet. App. 100). Following submission of briefs and oral argument, the Commission extended the time for compliance with the provisions of Order No. 174–A to December 1, 1954 (Pet. App. 101). On December 17, 1954, the Commission amended and reissued Order No. 174–A as Order No. 174–B, and denied all applications for rehearing.[3]

After the hearings on Order No. 174–A but prior to the issuance of Order No. 174–B, each of the

[3] Only 174–A is involved in this proceeding, although Order No. 174–B in material respects is identical to the prior order (Pet. App. 102–107). In Order No. 174–B the Commission emphasized that the order was procedural and non-substantive in nature and went on to state (Pet. App. 103–104):

> * * * We recognize the desirability for clarification of jurisdiction in the light of the Phillips decision. This is of serious concern to many independent producers and clarification is desirable not only to prevent unnecessary filings, but to assist those persons having honest doubt as to whether they come under statute. We have no desire to extend our jurisdiction beyond statutory limits. This problem is substantive and not procedural and cannot be dealt with here. Hearings are scheduled and will be concluded at the earliest practicable time in order to facilitate prompt determination of jurisdictional questions.

present petitioners filed petitions for review in the court below (Pet. App. 199–245).[4] Although the petitions for review raised various procedural objections to the order, their primary claim was that the order was invalid, arbitrary and unconstitutional as applied to petitioners because they are not "natural gas companies" within the definition of the Natural Gas Act (Pet. App. 8, 9). The Court of Appeals, Judge Brown dissenting, after noting that the order did not purport either to apply to the petitioners or to determine which of the many independent producers were subject to regulation, held that the order was only procedural and did not affect any substantive rights and so was not reviewable under Section 19 (b) of the Natural Gas Act or Section 10 of the Administrative Procedure Act.[5] It therefore dismissed the petitions for want of jurisdiction (Pet. App. 1–50).

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[4] In addition, they sought a stay of the Commissioner's order (Pet. App. 158–197); stays were allowed to Magnolia Petroleum Company and Ohio Oil Company (Pet. App. 128).

[5] While the question presented in the petition invokes Section 10 of the Administrative Procedure Act, petitioners do not deal with this issue in their discussion under the heading, "Reasons for Granting the Writ." The brief discussion by the court below is, we believe, dispositive (Pet. App. 14–15):

> * * * the [Administrative Procedure] Act adds nothing to our jurisdiction under the Natural Gas Act. Section 10 of the Administrative Procedure Act provides that its provisions are applicable "except so far as (1) statutes preclude judicial review * * *" and the Supreme Court in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, characterized Section 19 (b) as one of the statutes precluding judicial review within the meaning of that section.

ARGUMENT

This is the third petition for certiorari filed by independent producers of natural gas seeking review of an order issued by the Federal Power Commission to provide a procedure for effectuating this Court's ruling in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, that sales made by independent gas producers for resale in interstate commerce are subject to the Natural Gas Act. See *Federal Power Commission* v. *Union Producing Co.,* 230 F. 2d 36 (C. A. D. C.), certiorari denied, 351 U. S. 927; *Gulf Oil Corp., et al.* v. *Federal Power Commission,* 230 F. 2d 40 (C. A. D. C.), certiorari denied, 351 U. S. 973; see also *Amerada Petroleum Corp.* v. *Federal Power Commission,* 231 F. 2d 461 (C. A. 10). Each of these petitions proceeds on the premise that the petitioners are not "natural gas companies" subject to the Natural Gas Act, and that the Commission order, which they say purports to give them such a status, is invalid and unconstitutional as applied to their sales and operations (see Pet. App. 8, 9). Each of the three Courts of Appeals which have passed on the question has recognized, however, that the Commission's order merely provides a procedural framework for applying the Natural Gas Act pursuant to the *Phillips* decision, leaving the question of the status of individual companies for subsequent determination. These holdings are clearly correct and there is no conflict of decisions. Accordingly, there is no more occasion for review here than there was in *Union Producing* and *Gulf Oil* in which certiorari was denied last term.

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1. The declared purpose of the Commission's Orders No. 174, 174–A, and 174–B was to provide "reasonably simple rules and regulations" whereby independent producers subject to the Commission's jurisdiction could come into compliance with the Act and thereby be relieved of the accounting, filing, and certification requirements of the Commission's outstanding regulations which, having been designed for pipeline companies, would have been burdensome if applied to producers (Pet. App. 59–61). The requirement of Order 174–A that those rates actually charged by the producers on June 7, 1954 (the date of the *Phillips* decision) be filed as initial rate schedules and that any changes in existing rates be filed with the Commission, pursuant to Section 4 (e) of the Act, were necessary preliminaries to the Commission's assuming jurisdiction over a new segment of the industry. The order was explicit, however, that determinations as to what independent producers were subject to the Act, and hence to the order's requirements, would await hearings in particular cases in view of the obvious impossibility of making such determinations in a general rule-making proceeding (Pet. App. 104). The Commission's order stressed, moreover, that in view of the general uncertainty as to the Act's coverage, wherever possible it would avoid the imposition of penalties for failure to comply with its general orders (*supra,* p. 4; Pet. App. 60–61).

It is thus clear that, on its face and in practical effect, Order No. 174–A was not an order issued "after

a hearing" in a proceeding under the Natural Gas Act of the type this Court held reviewable in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 384, and that petitioners are not persons aggrieved by the order within the meaning of Section 19 (b). The order was not specifically directed against them (*Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461 (C. A. 10); *United Gas Pipe Line Co.* v. *Federal Power Commission*, 181 F. 2d 796 (C. A. D. C.), certiorari denied, 340 U. S. 827), and petitioners themselves contend that they are not natural gas companies subject to Commission regulation under the Act. As the court below stated (Pet. App. 11):

> * * * we think it plain that the Commission has simply promulgated regulations of general applicability and not an order reviewable under Section 19 (b). The order does not change the petitioners' existing or future status or condition since it is not an adjudication that any particular natural-gas producer is a "natural-gas company" or an "independent producer." The definition of the latter as set forth in the order merely enunciates a classification of certain types of "natural-gas companies," but such a classification in a general regulation does not subject any person or corporation to the Commission's jurisdiction. If persons whose sales of natural gas are such as to bring them within the Commission's jurisdiction, this circumstance arises by reason of the Natural Gas Act itself and not by virtue of the order in question.

would have been to hold individual hearings with respect to each of innumerable companies to determine upon adduced facts whether they were under its jurisdiction. The impracticability of such a method is obvious.

* * * * *

* * * The fact remains that this case comes to us without a record, without a single established fact or finding, and without evidence, and in that posture we as an appellate court are asked to exercise our appellate powers of review. In fact, we are asked to determine that petitioners are not subject to the jurisdiction of the Commission without a single fact upon which to base such determination and in the absence of any findings of fact by the Commission.

2. The very same considerations apply here. If petitioners are not subject to Commission regulation, Orders No. 174, 174–A, and 174–B do not apply to them and they are not required to comply with these orders.[6] Moreover, they have not availed themselves

[6] While the court below, in view of its disposition of the cases, did not reach the merits of the alleged illegal invasion of petitioners' substantive rights, it may be noted that two of the petitioners' principal claims relate to the Commission's requirement that independent producers file as their initial rates the rates in effect on June 7, 1954, the date of the *Phillips* decision, and the further provision that rate increases effective after June 7, 1954, even though pursuant to escalation clauses in contracts filed as initial rate schedules, must be filed as rate changes pursuant to Section 4 (d). See Pet. pp. 17–19. These contentions have already been rejected in *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F. 2d 726 (C. A. 10), certiorari denied November 13, 1956, No. 418, this Term; *Continental Oil Co.* v. *Federal Power Commission*, 236 F. 8d 839 (C. A. 5), pending on petition for certiorari, No. 457, this Term. As demonstrated in our briefs in opposition in Nos. 418 and 457, these provisions were well within the Commission's authority.

of the remedy offered to them for determining whether they are in fact subject to Commission regulation. Order No. 174–B, adopted on December 17, 1954, stated that hearings would be held as soon as practicable to determine the status of the various independent companies, and a number of independent producers have brought proceedings to determine their status under the Act pursuant to Section 1.7 (c) of the Commission's rules, which provides for "a declaratory order to terminate a controversy or remove uncertainty." Petitioners, however, did not seek an authoritative ruling by the Commission as to their status under the Natural Gas Act[7] (although one of the petitioners (Wesley West) applied for a declaratory order in October 1954, but withdrew his application at the hearing before the Commission on November 22, 1954).

Prior holdings of this Court make it clear that petitioners were required to pursue the remedy provided by the Natural Gas Act and the Commission's regulations despite allegations of irreparable injury, and that the Court of Appeals was correct in holding that

[7] It is clear that an order of the Commission determining petitioners' status under the Act would be reviewable by a Court of Appeals pursuant to Section 19 of the Natural Gas Act and by this Court through writ of certiorari. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672. Three such petitions for review of Commission orders in Section 1.7 (c) proceedings, holding independent companies subject to the Act, are now pending before the Fifth Circuit: *Deep South Oil Co.* v. *Federal Power Commission*, No. 15,849; *Humble Oil & Refining Co.* v. *Federal Power Commission*, No. 15,884; *Shell Oil Co.* v. *Federal Power Commission*, No. 15,900. See also *J. M. Huber Corp.* v. *Federal Power Commission*, 236 F. 2d 550 (C. A. 3).

it could not substitute itself for the agency which Congress had established to make the initial determination of petitioners' status under the Act. *Myers* v. *Bethlehem Shipbuilding Co.,* 303 U. S. 41; *Macauley* v. *Waterman Steamship Corp.,* 327 U. S. 540; *Federal Power Commission* v. *Arkansas Power & Light Co.,* 330 U. S. 802; *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752; *Securities & Exchange Commission* v. *Otis & Co.,* 338 U. S. 843; *Lichter* v. *United States,* 334 U. S. 742; *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535.

Every factor which led this Court to require exhaustion of administrative remedies in earlier cases involving allegations of irreparable injury, such as *Myers* v. *Bethlehem Shipbuilding, supra,* is present here, militating against a premature and disruptive assumption of jurisdiction by the Court of Appeals. The problems facing the Commission following the *Phillips* decision were vast in scope and complexity, and the questions involved—including the applicability of the Act to individual companies—were peculiarly within the Commission's competence. A uniform, orderly, and expeditious extension of the Act's coverage was essential to give proper effect to this Court's decision, as well as to avoid injustice and inequity to the companies involved. See *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U. S. 492, 501.

The normal necessity for exhausting the administrative remedy is strengthened in this case by the fact that Congress, in Section 19 of the Natural Gas Act,

provided a special procedure for obtaining review of Commission orders respecting coverage, and "Section 19 (b) reflects the policy that a party must exhaust its administrative remedies before seeking review." *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499. See *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159; *Federal Power Commission* v. *Union Producing Co.*, 230 F. 2d 36 (C. A. D. C.), certiorari denied, 351 U. S. 927.

3. Petitioners contend (Pet. 8–15) that the decision below conflicts with this Court's decisions in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; *Frozen Food Express* v. *United States*, 351 U. S. 40, and *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192. Similar assertions were made in the petitions in *Union Producing* and *Gulf Oil, supra.*[5]

Columbia Broadcasting (Pet. App. 12), as the court below recognized, did not involve a question of coverage, for the Communications Commission regulations were clearly applicable to all radio station licensees, had an immediate adverse effect on the broadcasting company's contractual relations with its component stations, and were substantially self-executing. Unlike the instant case, therefore, there was no question of status to be resolved by the agency. Here, the Power Commission must decide initially whether petitioners are subject to the Act at all. Moreover, the

[5] The *Union Producing* petition, No. 792, 1955 Term, alleged a conflict with *Columbia Broadcasting*. The *Gulf Oil* petition, No. 888, 1955 Term, in addition asserted a conflict with *Frozen Food Express*.

regulations in the *Columbia Broadcasting* case—unlike the present order—were substantive and not merely procedural in nature, since they outlawed certain provisions in existing contracts between the network and its component stations. There is thus nothing in the *Columbia Broadcasting* ruling contradicting the well-established principle that one who complains of agency action must pursue to its conclusion the administrative remedy provided by Congress before resorting to the courts for a determination of his rights. See *Amerada Petroleum Corp.* v. *Federal Power Commission,* 231 F. 2d 461 (C. A. 10).

The same considerations distinguish *Storer* and *Frozen Food Express. Frozen Food Express* involved a general order of the Interstate Commerce Commission, issued after hearing, finding certain commodities to be non-agricultural, and hence not within the Act's "agricultural" exemption. *Storer* concerned a Federal Communications Commission regulation of general applicability which was promulgated after hearing and by its terms prohibited a broadcaster from acquiring more than a limited number of stations. In neither case was there any doubt that the agency order applied to the parties seeking review. Since this Court regarded agency action as complete in both cases, the issue was whether the petitioners were "aggrieved" parties, entitled to obtain review of an agency order of general applicability. 351 U. S. at 44, 198. The Court, finding that in one case the practical effect of the agency action was to deny the petitioner the right to carry certain commodities, and in the

other to limit the scope of its business, held that the regulation had an immediate substantive impact on the persons seeking review. 351 U. S. at 44, 199, 200. Here, petitioners question that they are subject to the order at all, and the order did not purport to determine petitioners' substantive rights but only to establish procedural requirements under the Natural Gas Act applicable to persons subject to its terms.

CONCLUSION

The decision below is correct and in accord with the decisions of the other Courts of Appeals which have passed on the question. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 558

MAGNOLIA PETROLEUM COMPANY, THE OHIO OIL COMPANY, THE SUPERIOR OIL COMPANY and WESLEY WEST, *Petitioners*

v.

FEDERAL POWER COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

The Brief in Opposition filed on behalf of the Federal Power Commission presents a totally erroneous picture of what is involved in this case, both as it was decided by the court of appeals and as it is brought to this Court on petition for a writ of certiorari. The central theme of the Brief in Opposition is the contention that petitioners have no standing to seek judicial review of Order No. 174-A at this time because the order, it is asserted, constitutes merely "rules and regulations" and its applicability to these petitioners is a matter to be determined by subsequent proceedings (Br. in Opp. 8, 12-14). This contention is wholly

without foundation and may possibly create a misconception of the issues to be resolved. Accordingly, we are impelled to file this brief reply.

I

THE ISSUE IN THIS CASE IS NOT WHETHER PETITIONERS ARE NATURAL GAS COMPANIES, BUT WHETHER ORDER NO. 174-A IS A VALID ORDER

Contrary to what the Commission urges, there is no issue in this case as to the applicability of Order No. 174-A to these petitioners and their business activities. *Petitioners affirmatively alleged in their petitions for review that they are "independent producers", as that term is defined in the order, and that the order applies to them and their businesses.*

In its Application for Rehearing before the Commission (App. B, 162-171) and in its petition for Review in the court of appeals (App. B, 214-223), petitioner The Ohio Oil Company alleged (App. B, 163, 215):

> *Petitioner is an "independent producer" of gas as that term is defined and used in Order No. 174-A.* * * * The Order, although not specifically directed to Petitioner will, unless set aside, affect and determine the rights of Petitioner as fully as the Order would had it been directed specifically to Petitioner, instead of to "independent producers", of which Petitioner is one of such class. (emphasis added)

Similar allegations appear in the Applications for Rehearing and the Petitions for Review filed by each of the other petitioners: Magnolia Petroleum Company (App. B, 141, 201); The Superior Oil Company (App. B, 173, 226); Wesley West (App. B, 194, 236).

The class of persons to whom Order No. 174-A is directed is defined, in Sec. 154.91 thereof, as follows (App. A, 80):

> § 154.91 "Independent producer" defined. An "independent producer" as that term is used in §§ 154.91 to 154.102 means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

Since each of these petitioners alleged, in their respective petitions for review, that it is an "independent producer" within the meaning of the above definition, the court of appeals was not called upon to determine their status as natural gas companies. Moreover, if, as the Commission contends, "independent producers", as defined in Order No. 174-A, are natural gas companies within the meaning of the Act (Br. in Opp. 3, 4; see also the heading to Sec. 154.92 (App. A, 80): *Filing of rate schedules by producer-gatherer "Natural-Gas Companies"*), then it necessarily follows that these petitioners, by admitting they are independent producers, have also admitted they are natural gas companies. On the other hand, if the Commission is incorrect in this regard, the order, for all the more reason, is reviewable because the Commission has extended its jurisdiction to persons and activities not covered by the Act. In either event, petitioners have standing to challenge the validity of the order.

The Commission is thus shown to be in error when it states that "petitioners question that they are subject to the order at all" (Br. in Opp. 17) and further that "each of these petitions proceeds on the premise that

the petitioners are not 'natural gas companies' subject to the Natural Gas Act" (Br. in Opp. 6, 7). A similar error appears in the Commission's implication (Br. in Opp. 6) that this is the primary claim made by petitioners, citing in support two pages from the opinion of the court of appeals. These pages (Pet. App. 8, 9) reveal no such claim. On the contrary, they embrace footnote 7 of the court's opinion, which sets forth, in ten paragraphs, the substantive issues raised by petitioners. Because of these grave errors, the Commission's effort to sustain the judgment below, on grounds different from those assigned in the opinion, is untenable. Indeed, the judgment cannot be sustained on any ground.

Although it is true that three of the petitioners, Magnolia Petroleum Company, The Superior Oil Company and Wesley West, in their respective applications for rehearing before the Commission alleged that they are not natural gas companies within the meaning of the Act (App. B, 153, 175, 193) and requested the Commission to declare them not to be natural gas companies (App. B, 156, 188, 197), it is likewise true that they did not, in their petitions for review, seek a declaration of the court below that they are not natural gas companies. On the contrary, they confined their attack to the validity of the order as it applies to independent producers, a class to which they alleged they belonged. (App. B, 210, 233, 244). These three petitioners therefore abandoned on appeal any error the Commission may have made in failing to declare their status, and any allegations in their petitions for review that they are not natural gas companies do not preclude their attack upon the validity of an order which they affirmatively allege applies to them and disrupts their established businesses. Moreover, the

fourth petitioner, The Ohio Oil Company, neither alleged that it was not a natural gas company nor requested a determination as to its status as such, by either the Commission or the court of appeals (App. B, 162-171, 214-223).[1]

It is thus seen that the issue as to petitioners' status as natural gas companies was not presented to and was not decided by the court of appeals.[2] The present case is, therefore, clearly distinguishable from *Federal Power Commission* v. *Union Producing Co.*, 230 F. 2d 36 (C.A.D.C., 1956), cert. den. 351 U.S. 927, and *Gulf Oil Corporation* v. *Federal Power Commission*, 230 F. 2d 40 (C.A.D.C., 1956), cert. den. 351 U.S. 973, where Union and Gulf instituted district court equity proceedings to enjoin the Commission from enforcing the order against them on the ground that they and their activities were not subject to the Natural Gas Act. See 230 F. 2d at 37, 39. See also the opinions of the district court, 127 F. Supp. 88, 89; 128 F. Supp. 446, 448. In like manner, *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461 (C.A. 10, 1956) was different from the present case. In that case, the petitioners refused to admit that the Commis-

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[1] If the decisive factor is whether petitioners did or did not allege that they are not natural gas companies, then certiorari must certainly be granted, at least as to The Ohio Oil Company. Of course, these allegations are not decisive of the reviewability of the order, because if it is invalid as to one of the petitioners, it is invalid as to all, for each alleged that the order applied to it and its business.

[2] As pointed out in our petition (p. 8, fn. 5) the court of appeals did not pass on the Commission's contentions as to (1) prematurity and (2) lack of aggrievement. The sole issue determined by the court below, and the sole question presented here, is whether Order No. 174-A is a reviewable order.

sion had jurisdiction over them and "in fact asked [the Court] to determine that they are not subject to the jurisdiction of the Commission". 231 F. 2d at 464.

Here, petitioners' complaint is directed to the validity of Order No. 174-A, which, they strongly assert, exceeds the statutory authority of the Commission under the Natural Gas Act. They thus occupy precisely the same position as did the complainants in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, *Frozen Food Exp.* v. *United States*, 351 U.S. 40, and *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192,[3] and it is interesting to note that this distinction was recognized in *Federal Power Commission* v. *Union Producing Co.*, 230 F. 2d 36 (C.A.D.C., 1956), where the court in distinguishing the *Columbia Broadcasting* case, observed (230 F. 2d at 39):

> * * * *Columbia Broadcasting System* v. *United States* * * * did not involve the question of CBS' status. That was already clear. The relief asked by CBS was not the securing of a determination as to whether or not certain transactions (and CBS as a participant) were within the terms of the Federal Communications Commission regulations. CBS wanted a court ruling that the regulations in their entirety were outside the agency's statutory authority. * * * The only action remaining in the CBS case was the enforcement by the Commission of the regulations against a station licensee.

In the present case, petitioners, like CBS, make a frontal attack on the order itself and challenge the statutory authority of the Commission to issue such an order. As parties admittedly subject to the order

[3] See our petition for a writ of certiorari, pp. 8-15.

and presently aggrieved by its provisions, petitioners are entitled to have the validity of the order determined by a judicial tribunal *now*, without awaiting subsequent piecemeal proceedings which would be unnecessary if the order is invalid.

II

ORDER NO. 174-A IS SUBSTANTIVE, NOT PROCEDURAL, IN CHARACTER

The Commission argues that Order No. 174-A consists merely of procedural "rules and regulations" which do not affect substantive rights, referring to the "declared purpose" of the order (Br. in Opp. 8) and to the Commission's subsequent statement in the preliminary paragraphs of Order No. 174-B (Br. in Opp. 5; App. A, 103-104). The test, of course, is what the order does, not what a recital thereto says it does. As this Court said in the *Columbia Broadcasting* case (316 U.S. at 416):

> The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.

As we have shown in our petition (pp. 15-22), Order No. 174-A constitutes a direct and definitive invasion of petitioners' substantive rights. It directs petitioners, who are admittedly covered by the order, to do and not to do things not commanded and not prohibited by the Natural Gas Act.[4] Among other things,

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[4] There is no basis for the Commission's suggestion (Br. in Opp. 3) that, in the absence of Order No. 174-A, petitioners would be subject to the requirements of the Commission's earlier regulations which were admittedly designed to implement regulation of interstate pipeline companies. Not only were those regulations promulgated at a time when the Commission had administratively con-

the order freezes contract prices at the levels in effect on June 7, 1954; it outlaws any subsequent periodic price increases for which provision may have been made in previously executed contracts; it prohibits the abandonment of any sale being made on June 7, 1954;[5] it prohibits petitioners from exercising the rights they expressly reserved to cancel their contracts should they ever become subject to the price-fixing powers of the Commission. See our petition, pp. 4-5, 16-17. These proscriptions are substantive in character. Petitioners are entitled to know *now* whether the Commission has authority to issue such an order.

Petitioners were hurt when the Commission, by the order, rolled back all contract prices to the level of

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strued the Natural Gas Act as not applicable to independent producers, but the regulations, by their very terms, were directed to pipeline operations. See Order No. 99, issued August 26, 1942, Sec. 57.5, 7 F.R. 6844, 18 CFR (1944 Cum. Supp.) 57.5; Order No. 141, Sec. 157.5, 12 F.R. 8600, 18 CFR, 1949 ed., 157.5. Moreover, the regulations as originally issued, implemented the "grandfather" clause, with its optional 90-day provision, in Sec. 7(c) of the Act, 15 U.S.C. 717f (c), (App. A, 135-136) and under the regulations the filing of applications and continuation of service were voluntary. See Order No. 91, issued February 20, 1942, Sec. 57.1-57.4, 7 F.R. 1125, 18 CFR (1944 Cum. Supp.) 57.1 *et seq.* The original pipeline regulations contained no mandatory provisions such as those found in Secs. 157.23(a) and 157.28 of Order No. 174-A (App. A, 85, 89). They applied only to those who voluntarily elected to come under the Act.

[5] It is for this reason, among others, that the present case is distinguishable from *United Gas Pipe Line Co.* v. *Federal Power Commission*, 181 F.2d 796 (C.A.D.C., 1950), cert. den. 340 U.S. 827, which is cited by the Commission. The *United* case involved FPC Order No. 144 requiring pipelines to convert their rate schedules to a tariff-schedule form. The order did not, however, increase or decrease rates under existing contracts and the Commission assured the court that the order would operate only prospectively. 181 F.2d at 799, fn. 6.

the prices being charged on June 7, 1954 (Sec. 154.94, App. A, 81-83). They were further hurt when the Commission, by merely defining in the order what constitutes a change in a rate, assumed the power, without statutory authority, to suspend every price increase provided for in a gas sales contract.[6] Petitioners should not be required to wait until the Commission exercises the unlawful powers it assumed before they are permitted to attack the validity of the definition and the scheme of rate regulation provided for in the order.[7]

III

THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT

The Commission unsuccessfully seeks to escape the effect of this Court's rulings in the *Columbia Broadcasting, Frozen Food* and *Storer Broadcasting* cases, *supra,* by suggesting that in each of those cases there was no question as to the status of the complainant and the orders involved were substantive rather than procedural in nature (Br. in Opp. 15-17). For example, the Commission notes that in the *Columbia*

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[6] This was accomplished by providing that every future increase under a contract would constitute a change in the rate schedule, necessitating the filing of a new schedule, which when filed would then become subject to the suspension powers of the Commission under Sec. 4(e) of the Act applicable to new rate schedules. Sec. 154.94(a), (b), (c), App. A, 81-83.

[7] Should they wait, they would be confronted with a plea by the Commission that the suspension order is not appealable and its validity cannot be determined by a court. See *Humble Oil & Refining Company* v. *Federal Power Commission,* 236 F.2d 819, pending on petition for certiorari, No. 530, this Term; *Union Oil Company of California and Louisiana Land and Exploration Company* v. *Federal Power Commission,* 236 F.2d 816, pending on petition for certiorari, No. 579, this Term.

Broadcasting case the challenged order applied to "all radio station licensees" (Br. in Opp. 15); that in the *Frozen Food* and *Storer Broadcasting* cases, the attack was against orders of "general applicability" (Br. in Opp. 16). Similarly, it is pointed out that in *Columbia Broadcasting* the order "outlawed certain provisions in existing contracts"; that in *Frozen Food* "the effect of the agency action was to deny the petitioner the right to carry certain commodities", and in the *Storer Broadcasting* case "to limit the scope of its business" (Br. in Opp. 16-17).

Order No. 174-A has exactly the same effect. It applies to *all* independent producers of natural gas and these petitioners admit that it applies to them. It outlaws important clauses in their existing contracts, denies them the right to continue certain activities heretofore conducted, and directly affects and limits their business activities. See our petition, p. 15 *et seq.* The Commission, by its own analysis of these cases, has confirmed petitioners' assertion that the decision of the court of appeals is directly in conflict with the *Columbia Broadcasting, Frozen Food* and *Storer Broadcasting* cases.

CONCLUSION

The Commission, in opposing this petition, raises issues not here involved and not considered by the court of appeals. There is no question as to the status of these petitioners under the Commission's order. The sole question is whether these petitioners are entitled to a judicial review of the validity of the order. Prior decisions of this Court hold that they are.

The petition for a writ of certiorari should be granted.

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